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No. 95-806

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

PENN ADVERTISING OF BALTIMORE, INC.,
Petitioner,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE CITY, A MUNICIPAL CORPORATION; KURT L. SCHMOKE, IN HIS OFFICIAL CAPACITY AS MAYOR OF BALTIMORE CITY; DAVID TANNER, IN HIS OFFICIAL CAPACITY AS THE GENERAL SUPERINTENDENT OF ZONING ADMINISTRATION AND ENFORCEMENT OF BALTIMORE CITY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

In light of this Court's recent decision in *44 Liquormart, Inc.* v. *Rhode Island*, No. 94-1140 (May 13, 1996), the Court should grant the petition in this case, vacate the judgment of the court of appeals, and remand the case so that the Fourth Circuit may apply the correct legal standard under the First Amendment. As we anticipated in our earlier briefs (Pet. 27-28, Reply Br. 9), the issues of commercial speech regulation addressed in *44 Liquormart* are similar to those presented in this case, and the Court's decision in *44 Liquormart* confirms the error of the Fourth Circuit's constitutional analysis.

1. As we explained in the Petition (at 6), the Fourth Circuit held in this case that "a restriction on commercial speech must be upheld so long as the enacting legislature rationally could have believed, on the basis of the materials it had gathered, that the restriction would advance important state interests." Relying on this Court's decision in *Posadas de Puerto Rico Associates* v. *Tourism Co.*, 478 U.S. 328 (1986), the court below stated that "[t]he proper standard for approval must involve an assessment of the *reasonableness of the legislature's belief* that the means it selected will advance its ends." Pet. App. 11a (quoting *Anheuser-Busch, Inc.* v. *Schmoke*, 63 F.3d 1305, 1314 (4th Cir. 1995)) (emphasis added). In this case, however, instead of carefully reviewing the available evidence to determine whether the City in fact satisfied the contested elements of the *Central Hudson* standard, the Fourth Circuit deferred to the City Council's judgment that the outdoor advertising ban would advance its goal of reducing tobacco sales to minors. Pet. App. 10a; *id.* at 18a, 22a-24a (district court opinion).

This Court repudiated that analysis in *44 Liquormart*. It held that a restriction on truthful, non-misleading advertising could not be upheld in the absence of a specific factual showing that the speech restriction actually *does* advance the government's asserted goal, and does so *significantly*. *44 Liquormart*, slip op. 18-19 (opinion of Stevens, J.); see also slip op. 11 (Thomas, J., concurring in part and concurring in

the judgment); slip op. 4-5 (O'Connor, J., concurring in the judgment) (courts must not "accept at face value the proffered justification for the State's regulation, but [must] examine[] carefully the relationship between the asserted goal and the speech restriction used to reach that goal"). Moreover, the Court expressly disavowed the "highly deferential approach" urged by the government as an application of *Posadas*. Slip op. 24 (opinion of Stevens, J.); slip op. 4-5 (O'Connor, J., concurring in the judgment).

Thus, in both *44 Liquormart* and this case, the government failed to meet its obligation under *Central Hudson* to demonstrate *to the court* "not merely that its regulation will advance its interest, but also that it will do so 'to a material degree.'" *44 Liquormart*, slip op. 18 (opinion of Stevens, J.). According to the standard articulated in *44 Liquormart*, the reviewing court "must determine whether the [government] has shown that the [restriction on speech] will *significantly*" advance the government's interest. *Ibid.* (emphasis in original). The level of detail required to support a restriction on truthful, non-misleading commercial speech is substantial. See slip op. 20 (opinion of Stevens, J.) (noting absence of evidence concerning what price level would significantly reduce alcohol consumption and the amount prices would decrease without the ban). Without detailed proof demonstrating that the speech restriction *in fact* significantly advances the government's specific goals, the reviewing court would be required "to engage in the sort of 'speculation or conjecture' that is an unacceptable means of demonstrating that a restriction on commercial speech directly advances the [government's] asserted interest." *Ibid.* In this case, the district court did not even hold an evidentiary hearing, which would have allowed the parties to elucidate and test the efficacy of the speech restriction.

2. *44 Liquormart* also makes clear that the Fourth Circuit erred by failing to require the City to show "that its restriction on speech [is] no more extensive than necessary."

Slip op. 21 (opinion of Stevens, J.). This Court re-emphasized that the narrow tailoring requirement is not met if "alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the [government's] goal." *Ibid.* As Justice O'Connor remarked, "[t]he availability of less burdensome alternatives to reach the stated goal signals that the fit between the legislature's ends and the means chosen to accomplish those ends may be too imprecise to withstand First Amendment scrutiny." Slip op. 2 (O'Connor, J., concurring in the judgment). A restriction on speech is not narrowly tailored when the government's goal of modifying behavior could be accomplished by regulating that behavior directly. See *44 Liquormart*, slip op. 21 (opinion of Stevens, J.); slip op. 8 (Thomas, J., concurring in part and concurring in the judgment); slip op. 3-4 (O'Connor, J., concurring in the judgment).

By contrast, the Fourth Circuit deemed the effectiveness of less speech-restrictive means to be a matter of little relevance to its constitutional analysis. The court of appeals held that the First Amendment requires only that "the City would have to *consider* those [less speech-restrictive alternatives] * * * [not] that the City must abandon altogether an approach that directly advances its goal," even if it is not narrowly tailored. Pet. App. 11a-12a (quoting *Anheuser-Busch*, 63 F.3d at 1316) (emphasis added). We identified several direct regulatory alternatives that would have advanced the City's asserted goal without prohibiting truthful, non-misleading speech, but the courts below refused even to consider those less restrictive alternatives. See Pet. 18-19. This approach cannot be squared with this Court's decision in *44 Liquormart*.

3. This Court concluded its opinion in *44 Liquormart* by emphasizing that the government must "carry [a] heavy burden of justifying" a prohibition on truthful, non-misleading commercial speech. Slip op. 31. The Fourth Circuit plainly failed to impose that rigorous burden on the City. Instead, in

regard to (a) deference to the legislative judgment, (b) efficacy of the restriction on speech, and (c) availability of non-speech alternatives, the Fourth Circuit's approach is flatly inconsistent with *44 Liquormart*. Therefore, the writ of certiorari should be granted, the judgment below should be vacated, and the case should be remanded for reconsideration in light of this Court's discussion of the proper First Amendment standard.

Respectfully submitted.

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